No. 04-631

IN THE

Supreme Court of the United States

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

DAVID PRAGER, III
PRAIRIE BAND POTAWATOMI NATION
16281 Q Road
Mayetta, KS 66509
(785) 966-4030

IAN HEATH GERSHENGORN *
KATHLEEN R. HARTNETT
JESSICA RING AMUNSON
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* *Counsel of Record*

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QUESTION PRESENTED

Whether the Kansas tax here – "imposed on the use, sale or delivery of all motor vehicle fuels" – is invalid as applied to fuel sold and delivered to a tribally owned gasoline station on an Indian reservation for sale at market prices when the state tax would nullify a comparable tribal fuel tax that is dedicated exclusively to improving reservation roads.

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INTRODUCTION

The State's presentation rests on a pervasive series of mischaracterizations that seek to obscure what is ultimately at stake in this case. Respondent Prairie Band Potawatomi Nation (the "Tribe") does not contend, and the Tenth Circuit did not hold, that States are forbidden from enforcing non-discriminatory laws against Indians doing business outside of Indian country. Likewise, the Tribe does not contend, and the Tenth Circuit did not hold, that a non-discriminatory, off-reservation state tax of general applicability may be precluded simply because the tax has an adverse economic impact on a Tribe or its members.

Attacking these straw men, the State never comes to grips with the actual issue presented here – the permissibility of a state tax that effectively *nullifies* a Tribe's power to impose a comparable tax on fuel sold at market price by a tribally owned, on-reservation gas station (the "Nation Station" or "Station"). The facts relevant to that issue are undisputed. The Tribe retails gasoline at the Station on its reservation. The Station charges market prices and does not "market a tax exemption" by luring customers to the reservation with artificially low prices. Rather, the Station's non-Indian customers generally travel to the rural Kansas reservation to visit the tribal casino – the principal economic engine for a Tribe that lacks abundant natural resources. The Tribe has imposed a tax on fuel sold at the Station, and that tax is dedicated by tribal law *exclusively* to the construction and upkeep of reservation roads and bridges, many of which the State and the County have failed to keep in proper repair. Application of the state tax has the practical effect of nullifying the tribal tax and eliminating *all* of the Tribe's fuel tax revenue.

The state tax thus interferes directly with a core attribute of *tribal* sovereignty – the Tribe's power to impose a fuel tax to finance the construction and maintenance of reservation roads and bridges. The State's studied ignorance of the Tribe's sovereign interest in taxation to support its infrastructure is ironic at best, as the power to tax is the very attribute of its own sovereignty that the State purports to vindicate. Despite the State's contentions, this case is not about economic advantage, but about how to accommodate the competing interests of two legitimate sovereigns. The State's solution is to deny the Tribe's interest in its entirety.

As the Tenth Circuit correctly recognized, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*Bracker*"), and other cases require a more nuanced analysis that accounts not only for the state interest, but also for the other interests at stake, including the Tribe's interest in funding reservation infrastructure – as other sovereigns do -- and the federal interest reflected in the comprehensive scheme governing reservation roads. Applying that analysis compels the conclusion that, with respect to fuel delivered to the Station, the state fuel tax cannot stand.

STATEMENT OF THE CASE

Eager to obscure what is at issue in this case, the State devotes less than a page to the "Material Facts." Kan. Br. 3-4. That is understandable, because a full consideration of the relevant facts – which, as the Tenth Circuit noted, the State did not contest, *see, e.g.*, JA133-34, 139-40, 142 – casts this case in an entirely different light.

A. Factual Background

1. Respondent Prairie Band Potawatomi Nation is a federally recognized Indian Tribe that was evicted from its

ancestral home in the Great Lakes region and eventually resettled in present-day Kansas. *See Tiller's Guide to Indian Country* 554 (Veronica E. Velarde Tiller ed., 2005 ed.).

Two treaties in the 1860s carved up the Tribe's Kansas reservation, and the Dawes Act of 1887 "all but decimated the tribal land base." *Id.* Through the early part of the 20th century, the Tribe "subsisted on farming, hunting and trapping, wage labor, and leasing of their lands," and the Tribe "suffered greatly through the Great Depression and the accompanying drought of the 1930s." *Id.* As recently as a decade ago, "economic opportunities on the reservation . . . remained rather limited." Tiller, *supra*, at 345 (1st ed. 1996).

2. The Tribe today resides on a 121-square-mile reservation in Jackson County, a remote county in northeast Kansas that has a population of roughly 13,000 people. The reservation contains some 212 miles of roads. Ownership and responsibility for maintaining those roads is allocated among the State, Jackson County, and the Tribe, which operates a Road and Bridge Department of 32 employees, 31 of whom are tribal members. As a result of the failure of the State and County to provide "proper road maintenance" on their roads found within the reservation, the Tribe has assumed responsibility for an increasing share of such maintenance. Ramirez Aff. ¶ 2 (JA79). The number of road miles for which the Tribe is responsible increased from 63 miles in 1996 to 118 miles in 2000 (55% of total reservation roads), including miles of state and county roads that the Tribe does not own. *Id.* The Tribe receives no state or county funding for this purpose.

The reservation lacks abundant natural resources or other obvious means of generating economic activity and drawing visitors and businesses to the reservation. To develop a

substantial on-reservation economy, the Tribe invested more than $35 million to construct a casino complex, which includes restaurants, a gift shop, and a hundred-room hotel. The Tribe owns and operates the casino pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and uses the casino revenues principally to fund tribal government programs and promote tribal economic development, as IGRA requires. *See id.* § 2710(b)(2)(B)(i), (iii).

The casino allows the Tribe to provide a range of government services on the reservation to members and non-members alike. The tribal police department is "a full service law enforcement agency" whose officers not only enforce tribal law but also act as certified Kansas law enforcement officers. Tiller, *supra*, at 555; K.S.A. § 22-2401a(3)(a). The Tribe operates an active court system with general jurisdiction to hear civil and criminal matters, *see* Tiller, *supra*, at 555, as well as a Department of Motor Vehicles. The Tribe also provides an extensive network of social services, including a new health clinic to serve the reservation, *id.*, an alcohol and drug center, a vocational rehabilitation program, and a food distribution network. *See generally* JA70-74. In addition, the Tribe devotes more than 43% of all gaming revenues to economic development and improving reservation infrastructure. Tiller, *supra*, at 555.

In 1999, the Tribe spent $1.5 million to build a state-of-the-art, full-service gas station and convenience store – including $250,000 for fuel handling facilities, JA41, 66 – on United States trust land near the casino, principally to serve the influx of casino patrons. JA37. The Tribe owns and operates the Station, providing all of its financing, accounting, and management. Roughly half of the Station's employees are tribal members. The Station purchases fuel

wholesale from Davies Oil Company, a non-Indian distributor with offices off-reservation, which delivers the fuel directly to the Station.

3. Three separate sovereigns claim the right to impose fuel taxes in connection with fuel sold at the Station. The federal government imposes a tax of 18.4 cents per gallon on the "removal, entry, or sale" of all motor fuel. *See* 26 U.S.C. § 4081(a)(2)(A)(i); *id.* § 4081(a)(2)(B). Revenues from the federal fuel tax – more than $24 billion nationwide in 2004 – constitute the bulk of the Federal Highway Trust Fund, which funds state, federal, and tribal road construction.

The Tribe also imposes a tax on sales of fuel at the Station. PBP Code § 10-6-1 *et seq.* (Resp. App. 15a). The tribal tax, which is imposed on retailers, was 16 cents per gallon when this litigation began, and has been 20 cents per gallon since January 2003. JA134. Pursuant to tribal law, the Tribe uses these tax revenues exclusively to construct and maintain roads, bridges, and rights-of-way located on or near the reservation. PBP Code § 10-6-7 (Resp. App. 16a). There are three gas stations on the reservation, but two are owned by non-members on fee lands and are considered untaxable by the Tribe under *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). The Station is thus the sole source of the Tribe's fuel tax revenue of approximately $300,000 annually.

The State of Kansas similarly has a fuel tax, *see* K.S.A. § 79-3401 *et seq.* (Resp. App. 1a), to fund construction and maintenance of public roads in Kansas. *Id.* § 79-3402. The state fuel tax generates substantial revenues – over $331 million in 1999 and $429 million in 2004. By law, the State is committed to pay a portion of the funds – roughly 40% – to counties and cities within the State for road and street

construction and maintenance. *See* K.S.A. § 79-34,142; <http://www.fhwa.dot.gov/ohim/hwytaxes/2001/kansas.htm >. In contrast, the State shares no fuel tax revenues with the Tribe, even though the State collects all of the tax revenues from the two non-tribally-owned stations on the reservation.

4. The record below contains an expert report (the "Pflaum Report") and numerous affidavits submitted by the Tribe that describe the Station's operation and the impact of the state and tribal tax schemes. None of this evidence was disputed by the State.

Unlike the tribal businesses in many previous cases to reach this Court, the Tribe's Station "sells fuel at fair market prices," JA133-34 – it "is not 'marketing a tax exemption,'" JA134 (quoting Pflaum Report); *see also id.* (noting that "the price of fuel at the . . . Station is . . . within 2¢ per gallon of the price prevailing in the local market"); JA39-40 (Pflaum Rep. § 4.02); JA86 (Moulden Aff. ¶ 2); JA69-70 (Boursaw Aff. ¶ 2.A). As the Tenth Circuit noted, the State "has not controverted the Nation's expert opinion or the Nation's affidavits and does not argue that the Nation sells fuel below market prices." JA134.[1]

The Station "does not seek nor does it compete for fuel purchases from those who would not otherwise be on the reservation." JA34 (Pflaum Report § 3.2). The Station is located on the casino access road approximately two miles from the nearest highway. It is not visible from the highway,

[1] Despite this concession, the State exaggerates the difference between the state and tribal taxes by comparing the state tax today (24 cents per gallon) with the tribal tax at the time suit was filed (16 cents per gallon). *See* Kan Br. at 3-4. The tribal tax is now, and was when this suit was filed, within 4 cents per gallon of the state tax. Regardless, the critical point is that it is uncontested that the Station sells fuel at "market prices."

and it is poorly situated to market gasoline to highway travelers. JA37 (Pflaum Report § 4.01). Instead, the Station generates customers as a result of its proximity to the casino. As the Tenth Circuit noted, the Tribe "submitted expert testimony, which the [State] does not dispute, that 'the "value marketed" by . . . [the] Station results from the business generated by the casino and from employees of the casino and [the Tribe's] government and residents.'" JA133 (quoting Pflaum Report). Indeed, 73% of the customers of the Station are casino patrons and employees, and another 11% otherwise live or work on the reservation. JA37, 91.

5. In 1992, the State entered into an agreement with the Tribe governing a range of "excise taxes," including fuel taxes. *See* JA20-26. The State and the Tribe agreed that "it is to their mutual benefit to cooperate in matters relating to taxation," and that the state legislature desired to "eliminate problems which result from tribal and state taxation and regulation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on the reservations and those off reservations." JA20-21. To effectuate these policies, the 1992 Agreement broadly exempted from state excise taxes all tribal sales on the reservation to non-Indian purchasers as long as the Tribe imposed its own tax of "not less than sixty percent" of the state tax. JA22. The agreement had a five-year term and was renewable by mutual consent of the parties. JA24.

The 1992 Agreement reflected the State's policy of respecting the sovereignty of other governments and avoiding "double taxation" of fuel. *See, e.g.*, K.S.A. § 79-3424; *id.* § 79-4301, art. I(4); JA18-19. In accordance with this policy, the state tax was not imposed on tribally taxed fuel delivered to Indian reservations in Kansas – just as it was not imposed on fuel destined out of State.

In 1995, the State abruptly changed its policy. The state legislature amended the fuel tax statute to eliminate the tribal exemption. *See Kaul v. Kansas Dep't of Revenue*, 970 P.2d 60, 65-67 (Kan. 1998) (describing the "long history of amendments"). Although the State retained the existing exemption for the sale or delivery of fuel to the United States, it provided that "this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel . . . is to a retail dealer located on an Indian reservation in the state." K.S.A. § 79-3408g(d)(2); *see also Kaul*, 970 P.2d at 65 (describing provision). Then, in 1997, the State declined to renew the 1992 Agreement – over the Tribe's objection – eliminating the final state-imposed bar to taxing tribal fuel.

6. It is undisputed that enforcing the state tax on fuel sold and delivered to the Station would effectively nullify the tribal fuel tax. Although a provision of the statute purports to place the legal incidence of the state tax on the distributor as the taxpayer, *see* K.S.A. § 79-3408(c); *but see infra* p.17 n.5, it also provides that distributors "shall be entitled" to pass the tax on to fuel retailers, *id.* § 79-3409; *see also Kaul*, 970 P.2d at 67 ("The legislature intended that distributors . . . include the fuel tax in the sales price when delivering fuel to retailers or collect the fuel tax from the retailers."). Because of the highly elastic demand curve in the market for fuel, the resulting double taxation would be fatal to the Station. *See* JA142. As the Nation's expert explained, "'the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Station's] fuel business to virtually zero.'" *Id.* (quoting Pflaum Report).

B. The District Court Proceedings

The Tribe brought suit in federal district court, seeking to enjoin the State from collecting its fuel tax on fuel delivered

to the Station. The Tribe argued principally that federal law preempted the state tax and that the tax infringed upon the Tribe's right to self-government.

The district court granted summary judgment to the State. JA90. The court analyzed the tax under both "federal preemption and tribal rights to self-government," JA111 (citing *Bracker*), but concluded that neither doctrine precluded the state tax.

C. The Tenth Circuit's Decision

The Tenth Circuit reversed. Applying *Bracker*, the court of appeals held that the Kansas tax "interferes with and is incompatible with strong tribal and federal interests against taxation." JA144.

The court of appeals concluded first that "the [Tribe]'s fuel revenues [are] derived primarily from value generated on its reservation." JA139. Central to the court's conclusion was that "the [Tribe] sells its fuel at fair market prices," and thus, "in stark contrast to the smokeshops in *Colville*, the [Tribe] is not marketing an exemption from state taxes." *Id.*; *see also* JA138-39 (noting that "the [Tribe's] fuel market does not exist because of a claimed state tax exemption"); JA138 (distinguishing *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 583-85 (10th Cir. 2000)).

As the court of appeals explained, by building the casino, the Tribe "created a new fuel market for an otherwise remote area," and then financed and built the Station – at the cost of over a million dollars – to service that market. JA140; *see* JA139. The Tribe's situation is thus like that in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), because its casino patrons "spend extended amounts of time using the entertainment services offered by the [Tribe]," and

are not lured to the reservation by low prices. JA131. The Tenth Circuit concluded that the Tribe's interests in avoiding the tax are "particularly strong" because the tax revenues are "'derived from value generated on the reservation by activities involving the Tribes.'" JA137 (quoting *Washington v. Confederated Tribes of Colville Indian Reservations*, 447 U.S. 134, 156-57 (1980) ("*Colville*")).

The Tenth Circuit also recognized the important tribal sovereignty interests at stake, most prominently the Tribe's need to "raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure" and to do so "without state assistance." JA141. These interests were critical because the Tribe "has financial responsibility for the majority of the roads and bridges on and near its reservation" – including (but not limited to) the access road to the casino – and because "[f]uel revenue is typically used to pay for a government's infrastructure expenses." *Id.* The court of appeals emphasized that it is not "economically feasible" for both the Nation and the State to impose taxes with respect to the Station's fuel, and application of the state tax would nullify the Tribe's effort to generate fuel tax revenue to fund these critical government services. *Id.*

The Tenth Circuit determined that the Tribe's interests in this regard were directly aligned with the "strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal government," as reflected in numerous federal statutes, as well as in Executive Branch orders and decisions of this Court. JA142-43. In contrast, the Tenth Circuit viewed the State's interest as minimal because the tribal tax revenue "is derived primarily from value generated on the reservation." JA143. Accordingly, the court of appeals held the Kansas tax invalid "as it applies to the Nation's fuel." JA144.

SUMMARY OF ARGUMENT

The state tax here would nullify tribal efforts to fund critical reservation infrastructure through a tribal tax on fuel sold at market price by a tribally owned station on the reservation. The State's principal argument is that the validity of the state tax must be assessed not under the framework established in *Bracker*, but instead under a categorical rule that a "non-discriminatory" state tax imposed on the "receipt of fuel off the reservation" is permissible absent express congressional preemption.

The State's effort to avoid *Bracker* postulates a tax that does not exist: a non-discriminatory tax imposed on the off-reservation receipt of fuel. As the text and structure of the state statute make clear, the tax is imposed not on the off-reservation receipt of fuel, but on its *on-reservation sale and delivery*. Thus, *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), squarely controls this case and precludes application of the state tax.

Nor is the tax non-discriminatory. The State has chosen to exempt fuel deliveries to other sovereigns, yet the State refuses to extend a similar exemption to Tribes. A tax that expressly discriminates against Tribes is invalid.

The State's effort to avoid *Bracker* is meritless in any event. The State suggests that *Bracker* does not apply because the reservation border acts as "a barrier to the reach of the tribe's interest." Kan. Br. at 16. But the Court has squarely rejected the argument that a state tax is categorically permissible because it is imposed on a non-Indian off-reservation, and cases dating back more than a century confirm the common-sense notion that off-reservation state regulation can impermissibly infringe a Tribe's sovereign interests. The State's contrary position

cannot be reconciled with the foundations on which *Bracker* rests – the Indian Commerce Clause and notions of inherent tribal sovereignty demand a more nuanced analysis.

That the State strains to avoid application of *Bracker* and its progeny is unsurprising, because a faithful application of that precedent condemns the Kansas fuel tax. The Tribe's power to impose a tax on fuel sold at market prices to fund critical infrastructure projects is a fundamental aspect of self-government that the state tax would effectively nullify – even though it is the precise analogue of the interest the State so vigorously presses on its own behalf. Moreover, the Station's customers are drawn by the on-reservation value generated by the Tribe's operation of its casino complex, which offers a wide range of services. The Tribe's interests are thus at their strongest.

A similarly strong federal interest favors preemption, reflected principally in the network of "congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development" in the context of reservation roads. *Bracker*, 448 U.S. at 143. Federal law expressly endorses the use of a "Tribal fuel tax" to improve roads that are, as the Bureau of Indian Affairs has put it, "among the most rudimentary of any transportation network in the United States." *See infra* p.36. The State's fuel tax frustrates the substantial interests in tribal economic development and sovereignty that Congress has sought to promote with respect to tribal roads.

The State's interests are correspondingly weak. The tax revenues at issue – roughly $300,000 annually – are less than one-tenth of one percent of the total state fuel tax revenues, and thus preemption would have only a negligible effect on the State's asserted interest. Nor can the State justify its tax

– which would give the State *all* of the tax revenue generated on the reservation – on the basis of maintenance that the County and State provide for some reservation roads. The State provides no services at all on tribally owned reservation roads, and it is precisely the inadequacy of county and state services on the roads they own that make the Tribe's need for fuel tax revenues so compelling.

The state tax is also precluded by the "independent but related" prong of *Bracker* that prevents the State from "unlawfully infring[ing] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). The State's principal response – that this argument is waived – is meritless. The Tribe squarely raised the argument below, as both the district court and court of appeals expressly acknowledged. JA115-20, 135.

The State is thus left to contend that *Bracker* should be abandoned. But that would require this Court to overturn more than 30 years of precedent without any sound justification for doing so. The state tax cannot stand.

ARGUMENT

I. THE STATE TAX IS NOT IMPOSED ON OFF-RESERVATION ACTIVITY, NOR IS IT "NON-DISCRIMINATORY."

The State and its *amici* spend page after page advocating that the settled approach set forth in *Bracker* and its progeny be replaced with a "'categorical' rule," Kan. Br. 16, that "absent express preemption, a state is free to apply its non-discriminatory, off-reservation laws (even against Indians)," *id.* at 17. As we will show, the State's proposed rule is inconsistent with this Court's precedents and contrary to the

well-established Indian law concepts those precedents reflect. *See infra* Part II. But the State's argument also fails at the most fundamental level because it is premised on a mischaracterization of the state tax, which is neither "imposed on off-reservation activity" nor "non-discriminatory."

A. The State Tax Is Imposed On The Sale Or Delivery Of Fuel To The Reservation.

The major premise of the State's argument is that the state tax "is *imposed* on the *off-reservation receipt* of motor fuel by the distributor." Kan. Br. 10 (emphasis added); *see also id.* at 3, 6, 13, 34. But that is incorrect. By its plain terms, the Kansas statute provides that the tax is "*imposed* on *the use, sale or delivery* of all motor vehicle fuels . . . which are used, sold, or delivered in this state for any purpose whatsoever." K.S.A. § 79-3408(a) (emphasis added). The title of the provision confirms that the taxable event is use, sale, or delivery in the State – and not the distributor's mere receipt of fuel. *See id.* § 79-3408 (entitled "Tax imposed on use, sale or delivery of motor-vehicle fuels . . . .").

Other related provisions reinforce that the Kansas tax is imposed on the distributor's use, sale, or delivery of the fuel rather than on the mere receipt of fuel by, or the sale of fuel to, the distributor. For example, a distributor is entitled to a tax refund for all fuel "lost or destroyed" (*e.g.*, by fire, leakage, or theft) while the distributor still owns the fuel. *Id.* § 79-3417. Were this a tax merely on receipt, such loss or destruction would be irrelevant to the distributor's tax burden. Moreover, the statutory definition of the taxable "distributor" is one who has "received *and* . . . uses, sells, or delivers . . . fuels in the State of Kansas." *Id.* § 79-3401(f)(4) (emphasis added). Thus, the distributor's mere

receipt is not the taxable activity, but instead precedes the subsequent taxable "use, sale, or delivery."

Under the plain terms of the statute, the distributor's receipt of fuel is only the first step in determining a distributor's tax obligation. *See id.* § 79-3408(c) (noting how state tax is initially "computed"); Kansas Form MF-52 (Resp. App. 18a-19a) (monthly form filed by distributor), *available at* <http://www.ksrevenue.org/pdf/forms/mf52.pdf>. The Kansas statute exempts from the tax numerous "transactions," *id.* § 79-3408(d), including the "*sale or delivery* . . . for export from the state of Kansas to any other state or territory or to any foreign country"; the "*sale or delivery* . . . to the United States"; the "*sale or delivery* of motor-vehicle fuel . . . to a contractor for use in performing work for the United States"; and the "*sale or delivery* of motor-vehicle fuel" to another distributor, *id.* § 79-3408(d)(1), (2), (3), (5) (emphasis added). The ultimate tax liability, therefore, depends on whether, where, and to whom the fuel is ultimately sold or delivered.

The purported imposition of the legal incidence of the tax on the "distributor of the first receipt" does not change the analysis. Kan. Br. 6, 13 (citing K.S.A. § 79-3408(c)). This preliminary incidence inquiry determines the identity of the taxpayer – not the nature of the taxable event, or whether that event occurs "on-" or "off-" reservation. For the Station, the relevant sale and delivery occur on-reservation.[2]

This Court has repeatedly recognized that a State may not escape preemption through clever recharacterization of

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[2] Title to the fuel passes when it is delivered to the Station. *See* K.S.A. (U.C.C.) § 84-2-401(2) ("Unless otherwise explicitly agreed[,] title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.").

its tax. *See, e.g.*, *Colville*, 447 U.S. at 163 (rejecting state effort relabel a personal property tax an "excise tax"); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 126-28 (1993) ("Oklahoma may not avoid our precedent by avoiding the name 'personal property tax' here any more than Washington could in *Colville*."); *cf. Nelson v. Sears & Roebuck Co.*, 312 U.S. 359, 363 (1941) (focusing, under Interstate Commerce Clause, on a tax law's "practical operation, not its definition or the precise form of descriptive words which may be applied to it") (internal quotation marks omitted). Kansas's repeated assertions that the tax is "off-reservation" thus do not make it so.[3]

Because the state tax is imposed on the sale or delivery of fuel to the reservation, it is squarely foreclosed by *Central Machinery*, 448 U.S. 160. *Central Machinery* involved the application of a state "transaction privilege tax" to the sale of tractors to a tribal enterprise by a non-Indian vendor that did not have a place of business on the reservation. There, as here, the state tax was imposed on the sale of merchandise delivered to the reservation; the legal incidence of the tax fell on the non-Indian seller; and the tax was added directly to the purchase price paid by the tribal business. *See* 448 U.S. at 161-62. Relying on *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the Court held the tax preempted by the Indian trader statutes, 25 U.S.C. §§ 261-264; *see also Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (upholding minimal burdens on off-reservation Indian traders but distinguishing "a tax imposed directly" on those traders).

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[3] Kansas tax statutes must be read to protect the rights of the Tribes, *Kaul*, 970 P.2d at 65, and are construed strictly against the State, *In re Tax Exemption Application of Kaul*, 933 P.2d 717, 725 (Kan. 1997).

The Court thus rejected the State's attempt to defend its tax as falling upon the off-reservation seller of goods and not the on-reservation sale, holding that, "regardless of the label placed upon this tax, its imposition as to on-reservation sales" was preempted. 448 U.S. at 164 n.3. The State's effort to "re-label" its tax here must meet the same fate.[4] This case thus presents no occasion to consider the State's contention that state taxes imposed on off-reservation activity are categorically lawful absent express preemption.[5]

B. The State Tax Is Not "Non-discriminatory."

The State also errs in describing the tax as "non-discriminatory." *See, e.g.*, Kan. Br. 6, 7, 17, 21. While taxing fuel delivered to the Tribe, the Kansas scheme exempts from taxation fuel sold or delivered to *all other sovereigns*. *See* K.S.A. § 79-3408(d)(1)-(2) (exempting fuel

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[4] In its reply brief at the certiorari stage, the State attempted to distinguish *Central Machinery* on the ground that, here, "the State tax is imposed on an activity that occurs entirely off-reservation prior to any subsequent delivery." Petr. Cert. Reply at 5. As noted, that does not accurately describe the Kansas tax.

[5] Notwithstanding K.S.A. § 79-3408(c), these same provisions call into question the Tenth Circuit's holding in *Sac & Fox*, 213 F.3d at 578-80, that the legal incidence of the state tax falls on the distributor. This Court has "squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 607 (1975). Here, the Kansas Legislature authorized the distributor to "charge and collect" the tax "as a part of the selling price" to the retailer, K.S.A. § 79-3409, and the state Supreme Court found that "[t]he legislature intended that distributors . . . include the fuel tax in the sales price when delivering fuel to retailers or collect the fuel tax from the retailers at the time the distributors deliver motor fuel to the retailers." *Kaul*, 970 P.2d at 67. The fairest reading of the statute is that the legal incidence of the tax actually falls on the Tribe, and thus cannot survive. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

sold to the United States, as well as fuel for "export from the state of Kansas to any other state or territory or to any foreign country"). A statute that grants exemptions to similarly situated sovereigns while withholding them from the Tribe is discriminatory on its face. *See First Fed. Sav. & Loan Ass'n of Boston v. State Tax Comm'n*, 437 U.S. 255, 257-58 (1978) (applying "similarly situated" test to determine whether state tax is discriminatory); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 816 (1989) (describing relevant inquiry as whether inconsistent tax treatment is "directly related to, and justified by, significant differences between the two classes") (internal quotation marks omitted).

Judge McConnell's analysis in *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (2005), *petition for cert. filed*, __ U.S.L.W. __ (U.S. June 23, 2005) (04-1740) ("*Wagnon*"), is instructive. In *Wagnon*, the Tenth Circuit addressed a Kansas statute that recognized vehicle registration and titling by other sovereigns, but refused to accept vehicle registration and titling by Kansas Tribes. Judge McConnell's concurrence applied *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and concluded that the grant of exemptions to other sovereigns while withholding those same exemptions from the similarly situated Tribe was "a form of discrimination" that rendered the tax invalid. *Id.* at 1030-31 (McConnell, J., concurring). Judge McConnell rejected Kansas' proffered "safety rationale" for its policy, noting that Kansas recognized vehicles registered and tagged in other States "without reference to any safety standards." *Id.* at 1031; *see also Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 700-02 (9th Cir. 2004) (stating that, although "'[t]ribal reservations are not States,'" the relevant comparison for discrimination purposes is between the

particular state and tribal governmental functions involved (quoting *Bracker*, 448 U.S. at 143)).

That same analysis requires the conclusion that the Kansas tax here is discriminatory, because it treats similarly situated governments differently without justification. Critically, the State cannot justify the statutory distinctions by arguing that the State provides services to the Tribe and its distributor that it does not provide to other sovereigns and their distributors. That argument is foreclosed by the decision in *Kaul*, which construed these exemptions as existing "because the sellers of motor fuel under the jurisdiction of foreign governments are taxed by their respective governments to maintain the roads within that jurisdiction." *Kaul*, 970 P.2d at 63. Particularly in light of the Kansas courts' interpretation of the statute, there are no significant differences that would justify refusing the Tribe an exemption that other sovereigns receive. *See Wagnon*, 402 F.3d at 1030 (McConnell, J, concurring); *see generally* S. Rep. No. 97-646, at 11, *reprinted in* 1982 U.S.C.C.A.N. 4580, 4589 (noting that "with the power to tax, the power of eminent domain, and police powers, many Indian tribal governments have responsibilities and needs quite similar to those of state and local governments").

In any event, a distinction between the Tribe and other sovereigns based on the services that Kansas provides would be meritless. To be sure, the Tribe's fuel distributor uses state roads to deliver fuel to the Tribe, but the distributor does the same when delivering tax-exempt fuel out of State or to the United States. Similarly, tribal members make ample use of Kansas's off-reservation roads, but so do out-of-state drivers and the federal government. And while the State provides road services on the reservation, it already collects fuel taxes from the two non-tribal stations on the

reservation, while doing nothing to service the majority of reservation roads, which are maintained by the Tribe. *See infra* pp. 43-45.

The discrimination here is especially stark because the State deliberately singled out in-state Tribes for specific and adverse treatment. *See supra* p.8 (describing 1995 amendment that expressly eliminated exemption for in-state Tribes while preserving exemptions for other sovereigns). That adverse treatment is particularly troubling because Kansas dedicates a significant percentage (more than 40% in 1999) of the revenue generated by the state tax to a special city and county highway fund, but provides no such revenue to the Tribe, even though the Tribe has sole responsibility for the majority of reservation roads. K.S.A. § 79-3425; *see also id.* § 79-34,142 (prescribing allocation formula). The Tribe thus receives neither a state exemption so that it can impose its own taxes, nor a share of in-state fuel tax revenues.

Because the Kansas tax is discriminatory, it cannot survive. This case thus presents no occasion to consider the State's efforts to avoid, eviscerate, or eliminate *Bracker*. *See* Cert. Opp. at 13 n.5.

II. THE FRAMEWORK ESTABLISHED IN *BRACKER* GOVERNS THE ANALYSIS HERE.

Regardless of whether the state tax is imposed on the off-reservation receipt of fuel or is non-discriminatory, *Bracker* provides the proper analytic framework. *Bracker* recognizes two "independent but related barriers" to state regulation. 148 U.S. at 142. State regulation may be "preempted by federal law," *id.*, or it may unlawfully infringe a Tribe's right to "'make [its] own laws and be ruled by them,'" *id.* (quoting *Williams*, 358 U.S. at 220); *see* Part IV, *infra*.

A. The Established Indian Preemption Framework Is Tailored To The Unique Status Of Tribes.

Under *Bracker*'s preemption inquiry, state jurisdiction is preempted by federal law "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("*Mescalero II*").

This inquiry, which reflects the Court's synthesis of nearly two centuries of precedent seeking to reconcile state and tribal sovereignty, *Bracker*, 448 U.S. at 141-42, derives from two primary sources of law. *See* NCAI Amicus Br. Part I.A. *First*, the Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, has "divested [the States] of virtually all authority over Indian commerce and Indian Tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."); *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). Thus, the Court's modern Indian preemption standard derives in part from Congress' "broad power to regulate tribal affairs under the Indian Commerce clause." *Bracker*, 448 U.S. at 142.

Second, Indian preemption doctrine is based upon "traditional notions of Indian self-government," which are "deeply engrained in our jurisprudence." *Bracker*, 448 U.S. at 143. Indeed, the Court has long recognized that an Indian tribe is a "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v.*

Georgia, 30 U.S. (5 Pet.) 1, 16 (1831), which retains the "right of self-government" free from state interference, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554-57 (1832). Although the Court has resisted an absolutist implementation of these principles, it has consistently reaffirmed aspects of the Tribes' retained sovereignty – chief among these the power of taxation, *see Colville*, 447 U.S. at 153; *Rice v. Rehner*, 463 U.S. 713, 722 (1983). Supplementing the force of the Indian Commerce Clause, the modern preemption doctrine also rests on the principle that "a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *Mescalero II*, 462 U.S. at 332-33 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-72 (1973)).

The Court's distillation of these principles requires a preliminary analysis of "who bears the legal incidence of a tax." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). If the legal incidence "rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. But where "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax," and the "Indian preemption" analysis requires weighing "the balance of federal, state, and tribal interests." *Id.*; *see Bracker*, 448 U.S. at 145-46; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982).

B. The Court Should Reject The State's Proposed Categorical Limitation Of *Bracker*.

The State contends that this Court has embraced a "'categorical' rule" that would sidestep this balancing

analysis when the incidence of the tax is imposed on a non-Indian for an off-reservation transaction. Kan. Br. at 16. Even if the tax here were imposed on the non-Indian distributor off-reservation, this Court's cases reflect no such categorical rule. *See* NCAI Amicus Br. Part I.B.

Far from endorsing the State's approach, the Court has repeatedly *rejected* arguments that the *Bracker* analysis does not apply when the State puts the incidence of the tax on a non-Indian off the reservation. *See, e.g., Chickasaw*, 515 U.S. at 459 (contemplating the application of Indian preemption where the legal incidence of a state tax is placed on the off-reservation "wholesalers who sell to the Tribe"); *Ramah*, 458 U.S. at 844 n.8 (rejecting "'legal incidence' test, under which legal incidence and not the actual burden of the tax would control the preemption inquiry"). Similarly, the Court has applied *Bracker* where a state tax imposes obligations on non-Indian businesses, *see, e.g., Milhelm Attea*, 512 U.S. at 73-74 (applying balancing test to evaluate obligations imposed on off-reservation wholesalers), and it has invalidated a tax on the "gross receipts" of an off-reservation business for products delivered to a Tribe on the reservation, *see Central Machinery*, 448 U.S. at 161-62.

Indeed, at least a century of precedent endorses the common-sense notion that off-reservation state regulation can impermissibly infringe tribal sovereign interests. In *Winters v. United States*, 207 U.S. 564 (1908), for example, the United States successfully sued to prevent the building of off-reservation dams and reservoirs that would have limited water flows to the reservation. *Id.* at 576; *see also Arizona v. California*, 373 U.S. 546, 598-601 (1963). The same principle is reflected in the fishing cases. In *United States v. Winans*, 198 U.S. 371, 379 (1905), for example, the Court enjoined the use of a "fishing wheel" on private property off

the reservation when that wheel unduly restricted the ability of the Tribe to fish at its "usual and accustomed places." And in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held that neither the Tribe nor the State could "rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share" of the fish. *Id.* at 682; *see also id.* at 679-85 (discussing cases).

The State seeks to ground its novel categorical rule in the statement in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." But *Jones* does not support the State's position here.

Jones involved state taxation of Indians who ventured off the reservation to build a ski resort, and thus the state tax was directed entirely at off-reservation activities of the Tribe and its members. The Court in *Jones* had no occasion to consider a context – such as the one presented here – in which an ostensibly off-reservation state tax effectively nullifies an important aspect of tribal sovereignty, such as a Tribe's ability to impose an on-reservation tax of its own to fund critical reservation infrastructure.[6]

There is therefore no basis for the State's contention that "this Court has determined that a tribe's reservation border acts as a barrier to the reach of a tribe's interest." Kan. Br. at 16. To the contrary, immunizing all off-reservation state action is incompatible with tribal self-government, as it would give the State the power to decide unilaterally when

[6] Indeed, here it is the *State* that is venturing *onto the reservation* to tax the sale and delivery of fuel to the Tribe. *See supra* Part I.A.

the Tribe can impose fuel taxes for critical infrastructure projects, even when the Tribe is not marketing a tax exemption. This Court has repeatedly rejected an approach that would allow Tribes to exercise sovereign authority "only at the sufferance of the State." *Mescalero II*, 462 U.S. at 338.

The Indian Commerce Clause similarly compels rejection of the State's contention. *See, e.g.*, *Colville*, 447 U.S. at 157 (acknowledging the Clause's "role to play in preventing undue discrimination against, or burdens on, Indian commerce"). The contours of the constitutional protection are determined by the extent of the burden on Indian commerce and the importance of the interests at stake, not by the manner in which state law imposes the burden. Yet, under the State's approach, federal and tribal interests weigh in the analysis when the taxed transaction is on-reservation, but become *entirely irrelevant* when the State simply moves the tax upstream without changing the material effect of the tax at all.[7]

The State's position here is thus reminiscent of one the Court rejected in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), where the Court held that merely shifting a tax "upstream" did not insulate it under the Interstate Commerce Clause. The state court had concluded that the Montana severance tax there at issue was valid *per se* because the state tax was "levied on goods prior to their entry into interstate commerce." 453 U.S. at 614. The Court

[7] The Court did state in *Chickasaw* that the State could "shift the tax's legal incidence." 515 U.S. at 460. But the shift in incidence there would have *triggered* – not foreclosed – the balancing test. *Id.* at 459. Nor can the State draw comfort from any suggestion in *Chickasaw* that the state tax would have survived the balancing test. The Tribe in *Chickasaw* was marketing a tax exemption, which *Colville* condemns. Here, the Tribe sells fuel at market price and generates on-reservation value.

rejected that rule, holding that "State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of the Commerce Clause inquiry." *Id.* at 616.

The State's categorical rule also would allow the State to circumvent settled precedent. This Court has held, for example, that sales to tribal members on the reservation are exempt from state taxation. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976). The State's approach would allow it to eliminate that tribal-member exemption simply by moving the incidence of the tax upstream. This Court's precedents cannot be so easily evaded. *See Sac and Fox*, 508 U.S. at 127 ("While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited.") (quoting *Colville*, 447 U.S. at 163); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (rejecting State's argument lest "otherwise all sorts of state taxation of reservation-Indian activities could be validated (even the cigarette sales tax disallowed in *Moe*)").

Finally, there is a far better way to handle these recurrent situations than establishing an inflexible legal rule that always favors States. *See generally* NITA Amicus Br. Over the past decades, numerous States including Oklahoma, Michigan, New Mexico, Montana, Arizona, Utah, and Nebraska have – like Kansas in 1992 – entered into agreements or enacted statutes that give Tribes a share of fuel taxes generated by sales on the reservation, providing tribal governments with millions of dollars for tribal roads.

See id. Under Kansas's categorical rule, States would have little incentive to make such agreements.

Disputes between States and Tribes, like disputes between States, are best resolved sovereign-to-sovereign in a manner that recognizes the governmental interests on both sides of the table. Federal law should provide background rules that favor context-sensitive accommodations between States and the Tribes – to whom the federal government owes trust responsibilities – rather than the one-sided "State takes all" categorical rule that Kansas desires here. *See id.*

III. THE BALANCE OF TRIBAL, FEDERAL, AND STATE INTERESTS PRECLUDES THE STATE TAX HERE.

Faithful application of this Court's precedents requires preemption of the state tax. Under those precedents, the Court must weigh "the balance of federal, state, and tribal interests." *Chickasaw*, 515 U.S. at 458; *accord Cotton*, 490 U.S. at 176; *Ramah*, 458 U.S. at 838. Notably, this analysis does not depend on "standards of pre-emption that have developed in other areas of the law." *Cotton*, 490 U.S. at 176. Express preemption is *not* required, *id.* at 176-77; *Mescalero II*, 462 U.S. at 333-34; the Court instead employs "a flexible pre-emption analysis sensitive to the particular facts and legislation involved," *Cotton*, 490 U.S. at 176.

Although this inquiry does not depend on "mechanical or absolute conceptions of state or tribal sovereignty," *Bracker*, 448 U.S. at 145, "the history of tribal sovereignty" provides a "necessary 'backdrop'" to the analysis, *Cotton*, 490 U.S. at 176, requiring treaties and federal statutes to be interpreted "generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 144.

Reinforcing this "history of tribal sovereignty" are "numerous federal statutes" that demonstrate the commitment of Congress and the Tribes to "promoting tribal self-government," *Mescalero II*, 462 U.S. at 334-35, and reflect "Congress' overriding goal of encouraging tribal self-sufficiency and economic development," *id.* at 335.

The Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, for example, was enacted "to provide a mechanism for the tribe as a governmental unit to interact with and adapt to a modern society," Felix S. Cohen, *Handbook of Federal Indian Law* 147 (1982 ed.), and to spur tribal economic development, *see Jones*, 411 U.S. at 152. Numerous other statutes – including the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450f *et seq.*, the Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, § 201 *et seq.*, 96 Stat. 2605, and the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* – similarly reflect the congressional commitment to tribal sovereignty, self-government, and economic development.[8] *See Bracker*, 448 U.S. at 143 n.10.[9]

A. The Tribe's Sovereign Interests In Imposing Taxes To Maintain Infrastructure And Foster Economic Development Are Compelling.

Ignoring this backdrop of tribal sovereignty, the State's brief treats tribal governments as little more than managers

[8] *See also* 25 U.S.C. § 1451 (declaring "policy of Congress" to enable Indians to "exercise responsibility for the utilization and management of their own resources"); 25 U.S.C. § 450a(b) (declaring commitment to the "development of strong tribal governments"); JA142-43.

[9] The Tribe invokes these provisions not as an independent basis for preemption, *cf. Cotton*, 490 U.S. at 183 n.14, but rather to reinforce and provide a backdrop for more specific federal enactments.

of private clubs, empowered to determine "tribe membership" but little else of substance. Kan. Br. 13-14. That crabbed view of tribal government has no basis in this Court's precedent and renders the State's cursory discussion of the tribal interests patently inadequate. *See, e.g.*, *Mescalero II*, 462 U.S. at 334-35 (recognizing that "Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Tribes in Indian country are "a good deal more than 'private voluntary organizations'")

"Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation," *Colville*, 447 U.S. at 153 (internal quotation marks omitted), which the tribes retain "unless divested of it by federal law or necessary implication of their dependent status," *id.* at 152; *accord Rice*, 463 U.S. at 722. That power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management," enabling "a tribal government to raise revenues for its essential services." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Mescalero II*, 462 U.S. at 335-36 (same). It also includes the power to tax commerce with non-Indians on the reservation. *See Colville*, 447 U.S. at 152; *Merrion*, 455 U.S. at 137.

These basic precepts of tribal power – which the State entirely ignores – cast the State's discussion of *its* interests in taxing fuel in a completely different light. *See* Kan. Br. at 10-13. Just as the power to tax is a claimed interest of the State as sovereign, so is the taxing power "a fundamental attribute of sovereignty which the tribes retain unless divested of it." *Colville*, 447 U.S. at 152. Just as fuel tax revenues enable a State (and the federal government) to build

and maintain essential infrastructure, so too is the Tribe's fuel tax "a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137. And just as an "extensive, well-maintained road and bridge system is vital to the State's economy," Kan. Br. at 12, so is such infrastructure a necessary precondition for the economic development of Indian Tribes. Indeed, inasmuch as "it is impossible to imagine that a state government could continue to exist without the power to tax," *id.*, so too is it for Tribes.

This case is thus not, as the State claims, simply about the State's power to tax and maintain its infrastructure. Nor is this case simply about what the State disparagingly describes as "Respondent's economic viability (*i.e.*, its profits)." Kan. Br. 28; *see also id.* at 5, 7, 8, 19. Rather, this case is about the need to reconcile and accommodate the recognized powers and interests of *two* sovereigns in imposing fuel taxes to raise revenue to build and maintain vital infrastructure. The State's proffered solution offers no accommodation at all: it effectively *nullifies* the Tribe's power to impose such a tax. *See supra* p.8.

When the State's tax or regulation would effectively nullify a Tribe's exercise of its sovereign power, the tribal interests are at their strongest. For example, in *Mescalero II*, the Court held that the authority of the Tribe there to regulate hunting and fishing by members and non-members on the reservation preempted conflicting state regulations because "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation." *Mescalero II*, 462 U.S. at 338. In *Cotton Petroleum*, the Court further underscored that complete displacement of a Tribe's power to tax – as here – is a compelling factor favoring the Tribe. There, the Court permitted a state severance tax on certain on-reservation oil and gas

production, but did so only because "no economic burden falls on the tribe by virtue of the state taxes," as "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development." *Cotton*, 490 U.S. at 185 (internal quotation marks and citation omitted).[10]

Furthermore, the Station sells its fuel at fair market prices and does not market an exemption from state fuel taxes to attract customers, *see* JA134, a fact that sharply distinguishes the sales here from those at issue in cases such as *Colville*, 447 U.S. at 155, *Moe*, 425 U.S. at 482, and *Milhelm Attea*, 512 U.S. at 64-65. It is undisputed that the "Station is a very different value proposition." JA41. The Station's customers come to the reservation because they are drawn to the on-reservation value generated by the Tribe's operation of a modern casino complex, which offers a wide array of related services in addition to gaming. The Tribe's interest is at its "strongest" where, as here, it attempts to capture the value it generates on the reservation. *Colville*, 447 U.S. at 156-57.

The additional evidence of significant tribal interest and involvement in the on-reservation value here is compelling. The Nation financed and constructed a $35 million casino and hotel, thereby generating a substantial flow of motor vehicle traffic in an otherwise remote location. To provide conveniences for employees and customers who travel on to the reservation, the Tribe financed and constructed the Station, a state-of-the-art, full service convenience store and

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[10] The State seeks to give *Cotton* controlling weight, *see* Kan. Br. 37-39, but completely ignores *Cotton*'s emphasis on the absence of tribal burdens. 490 U.S. at 185, 191. Because there were no significant tribal economic burdens at issue in *Cotton* – let alone the direct infringement of tribal sovereignty at issue here – the balance of interests in *Cotton* was altogether different.

gas station, at a cost of more than $1.5 million, including fuel handling systems that cost $250,000. The Tribe owns and operates and receives all revenues from both the casino and the Station, and many of the employees of the casino and the Station are tribal members. *Colville*, 447 U.S. at 156-57.

The tribal interest is further strengthened by the fact that the fuel distributor, the Station, and the Station's customers are all "recipient[s] of tribal services." *Id.* at 157. They benefit from the Tribe's construction and maintenance of roads on and near the reservation, JA79-81, 85 – including the main access road to the casino and the state highway intersection, JA67, 81. More generally, the distributor, the Station, and its customers benefit from a broad array of other tribal government services on the reservation. JA70-74.

This case is thus like *Cabazon* in which the Court found "on-reservation value" in an on-reservation gaming complex because – as here – the Tribe had "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide." *Cabazon*, 480 U.S. at 219. It is also like *Mescalero II*, in which the Court concluded that the State's hunting and fishing regulations were preempted where the Tribe had created "on-reservation value" by constructing a "resort complex" and developing the reservation's wildlife and land resources, thereby "generat[ing] funds for essential tribal services and provid[ing] employment for members who reside on the reservation." 462 U.S. at 341.[11]

[11] The Tenth Circuit did not hold, and the Tribe does not contend, that on-reservation value "automatically warrants preemption." *Cf.* Kan. Br. 36-37. It is one factor – albeit an important one – in the balance.

The State argues that *Thomas v. Gay*, 169 U.S. 264 (1898), somehow forecloses consideration of the on-reservation value generated here. Kan. Br. 34. But in *Thomas* – which upheld a state property tax imposed on cattle owned by non-Indian lessees of tribal land – the Tribe was not involved in generating the on-reservation value, as it neither owned the cattle nor participated in the grazing operations. Rather, *Thomas* involved only the Tribe's claim that it had a right to market an exemption from state taxes. *See Colville*, 447 U.S. at 183 (Rehnquist, then-J., concurring) (noting that in *Thomas* the "tribe complained that . . . lessees would be unwilling to pay the same price for tax-exempt grazing lands as for taxable grazing lands"). Moreover, *Thomas* did not involve competing tribal and state taxes, but only concerned the state's power to tax. *Thomas* thus did not present (as here) a "direct conflict between the state and tribal schemes." *Colville*, 447 U.S. at 158.[12]

The State next seeks to recast "on-reservation value" as limited to tribal activities concerning "natural resource[s] especially connected to [the Tribe's] land." Kan. Br. at 34, 36. But *Colville* forecloses such a limited meaning of "on-reservation value." Rather, *Colville* recognized that "on-reservation value" would result from "sales that, if credit [for the tribal tax] were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the [product]." *Colville*, 447 U.S. at 158. Here, the Tribe is generating "on-reservation value" under *Colville* because consumers are willing to venture onto the reservation to purchase fuel at

[12] The State's reliance on *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906), is also misplaced. That case only held that the mere expenditure of income from non-Indian property for charitable Indian work was insufficient to exempt the property from state taxation.

market prices. It is precisely the "location" of the business, the "efforts of the Tribes in importing and marketing the product," *id.*, and the Tribe's substantial efforts to create a resort complex that draw casino patrons to the Station.[13]

For the same reason, *Colville* forecloses the notion that "on-reservation value" must arise from a tribal manufacturing process and cannot involve the resale of goods, even as part of a larger integrated economic enterprise such as the casino complex. Such a limited notion of on-reservation value threatens to restrict tribal economic value to making "Indian products," such as baskets and jewelry, and selling timber and coal. It is thus contrary to federal self-determination policy, as well as settled notions of "reservation value" in cases such as Indian law, *see, e.g.*, *Cabazon*, and in other areas of this Court's jurisprudence, *see Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 178-79 (1983) (noting that "value" can result from a "substantial mutual interdependence" among related businesses having "functional integration, centralization of management, and economies of scale"); *see also* Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* 39-43 (1985) (discussing a broad range of value generating activities beyond manufacturing). There is no basis to "dismiss the contribution of retailing to the product value proposition." JA41.

Finally, Kansas contends that any focus on "marketing an exemption" risks a "slippery slope," and raises the specter that Tribes will impose a "nominal tax" and sell goods at a

[13] Limiting value to natural resources is particularly perverse here. *Cf. Ariz. v. Calif.*, 373 U.S. at 598 ("It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation.").

deep discount on the reservation. Kan. Br. 30, 35 (citing *Colville*, 447 U.S. at 155). That argument is inapt here, where the State did not contest that the fuel is sold at market prices. Moreover, the State can fully address these concerns by providing a credit for any tribal tax imposed or by enacting a state tax that applies only to the extent that the Tribe fails to impose an equivalent tribal tax. Either option ensures that the total (tribal and state) tax burden is the same for all stations in the State. That basic approach is reflected in the 1992 Agreement, as well as in agreements or statutes of other States, *see, e.g.*, N.M. Stat. § 7-13-4, and accommodates the interests of *both* sovereigns.[14]

B. There Is A Compelling Federal Interest Here.

A comprehensive federal scheme governing reservation roads reinforces the Tribe's compelling interest in exercising its taxing power to fund improvements in those roads. In that scheme, Congress expressly chose tribal sovereignty as a mechanism for improving reservation roads that are in a state of disrepair. Critically, the tribal sovereignty at the core of the federal program is tied *directly* to the exercise of tribal taxing authority at issue here – federal regulations recognize the importance of "funding sources" other than federal funds to improve and maintain tribal roads, and specifically identify a "Tribal fuel tax" as an appropriate source of funds to implement the federal program. 25 C.F.R. § 170.932(d). By nullifying the exercise of taxing power endorsed in the federal scheme – the very power traditionally used by sovereigns to fund critical infrastructure – the state tax stands as an obstacle to the purposes of the federal scheme.

[14] Moreover, this case involves not just a tax on goods, but a fuel tax, which has been the traditional means by which sovereigns fund roads, and which implicates a comprehensive federal scheme. *See infra* __.

1. The Indian Reservation Road ("IRR") system is a collection of more than 63,700 miles of road, 25,700 miles of which are owned by the BIA or the Tribes, and 38,000 miles of which are owned by State, County, or other entities. More than 2 billion vehicle miles are traveled on the IRR system annually. *See* Bureau of Indian Affairs, Dep't of the Interior, *TEA-21 Reauthorization Resource Paper, Transportation Serving Native American Lands* at 2 (May 2003) ("BIA Report").[15] That system, however, is in a state of disrepair. The federal government has described the IRR system as "among the most rudimentary of any transportation network in the United States," with "some roads resembl[ing] roads in developing nations." *Id.* at 10. The vast majority of reservation roads are unpaved, and "many miles of these roads are impassable immediately after rainstorms." *Id.* at 15. More than 70% of the reservation roads are classified by the BIA as being in "poor" condition. *Id.* at 16; *see also* S. Rep. No. 106-406 at 2 (2000) ("S. Rep.") (noting the "enormous and largely unmet need for transportation infrastructure on Indian lands"). *See* ITA Amicus Br. 5-9.

These disastrous road conditions affect virtually every facet of tribal life. Fatality rates on reservation roads are more than four times the national average. BIA Report at 16. Road conditions "[s]low transport to emergency health services," "[d]ela[y] fire suppression response," and cause "[a]ccidents and injuries to tribal members and others." *Id.* at 13. The provision of basic federal services is often impossible, as road conditions preclude operation of BIA-run school buses and, and on some reservations, have even

[15] Available at <http://198.104.130.237/ncai/advocacy/cd/docs/transportation-bia_tea21_reauthorization .pdf>.

caused the U.S. Postal Service to cease reservation deliveries. *See* ITA Amicus Br. 9.

The poor road conditions also impede tribal efforts to generate substantial and sustainable on-reservation economies. Improving tribal economies is the highest priority for tribal governments, BIA Report at 8, as well as a longstanding federal priority, and a functioning road system is a *sine qua non* of economic success. Poor roads result in higher costs of goods and services on Indian lands and create substantial barriers to commercial investment. *Id.* at 13. Sustained economic development – including "[a]ccess to . . . economic sites, tribal housing, and service facilities" – "*require[s] a viable IRR system.*" *Id.* at 8 (emphasis added); *see also* S. Rep. at 3 ("Poor transportation infrastructure has a devastating impact on Indian emergency services, law enforcement capabilities, and economic development.").[16]

2. To address this crisis in reservation roads, the federal government has established the very sort of "comprehensive and pervasive" framework, *Ramah*, 458 U.S. at 839, that this Court has previously found important in its preemption analysis. The federal framework both promotes the construction, improvement, and maintenance of reservation roads and encourages Tribes themselves to assume increasing responsibility for those tasks. The centerpiece of the federal involvement is the Indian Reservation Roads Program ("IRR Program"), which seeks to ameliorate the condition and chronic under-funding of reservation roads. The IRR Program's twin goals are to improve tribal infrastructure and promote tribal sovereignty and economic

[16] The Tribe's reservation exhibits these same problems, as most of the roads on the reservation remain unpaved and suffer from "lack of proper road maintenance." JA79, 81, 85.

development. *See* 69 Fed. Reg. 43090 (2004); *see* ITA Amicus Br. 10-17.

The Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998), is the latest manifestation of the federal commitment to the IRR Program. In TEA-21, Congress authorized $1.6 billion in federal funding for the IRR Program for fiscal years 1998-2003, *id.* § 1101(a)(8)(A), and it directed the Secretary of the Interior to issue regulations governing the IRR program, 23 U.S.C. § 202(d)(2)(B). In particular, Congress required the Secretary to develop "transportation planning procedures" for reservation roads and bridges, *id.* § 204(a)(2), and to establish a "nationwide priority program for improving deficient Indian reservation roads and bridges." *Id.* § 202(d)(4)(A). Congress further authorized Interior Department appropriations for the "survey, improvement, construction, and maintenance of Indian reservation road bridges" that do not otherwise receive federal funds. 25 U.S.C. § 318a. Consistent with these directives, the Secretary of the Interior has adopted comprehensive IRR regulations. *See* 25 C.F.R. Part 170; *see also* 69 Fed. Reg. 43090-141.

3. Promoting tribal sovereignty and self-sufficiency are central to the IRR Program, and, indeed, to federal Indian policy more broadly. *See Rice*, 463 U.S. at 724 (the federal interest is strongest when it reflects "'a firm federal policy of promoting tribal self-sufficiency and economic development'" (quoting *Bracker*, 448 U.S. at 143)); *see also supra* p.38 (describing federal commitment to fostering tribal economic development and self-government).

Significantly for present purposes, the tribal sovereignty at the core of the IRR Program is tied directly to the tribal

taxing authority at issue here. The IRR regulations recognize the importance of "additional funding sources" to improve and maintain tribal roads, and they specifically identify, as one potential avenue for funds, a "*Tribal fuel tax*." 25 C.F.R. § 170.932(d) (emphasis added).

Indeed, the IRR Program leaves little doubt that strengthening tribal sovereignty is critical to its success. The regulations recognize, for example, that "Tribal governments, as sovereign nations, have inherent authority to establish their own transportation departments under their own tribal laws." *Id.* § 170.930. In addition, the regulations allow Tribes to take control of IRR funds pursuant to ISDEAA, which promotes "greater tribal self-reliance brought about through more 'effective and meaningful participation by the Indian people' in, and less 'Federal domination' of, 'programs for, and services to, Indians.'" *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. 1172, 1178 (2005); *see* 23 U.S.C. § 202(d)(3); 25 C.F.R. § 170.610 *et seq.* Congress also makes tribal governments an integral part of the state planning process. *See, e.g.*, 23 U.S.C. §§ 135(e)(2)(C), (f)(1)(B)(iii); *id.* § 135(d)(2).

4. The state tax directly frustrates the goals of this federal scheme. As Congress and the relevant federal agencies intended, the Tribe, in its capacity as a sovereign, has imposed a fuel tax to address the severe problems identified by the federal government, thereby allowing the reallocation of federal funds for other needed roads projects. Implementation of the State's tax with respect to on-reservation fuel would effectively eliminate the tribal tax.

The State's asserted right to determine unilaterally whether a Tribe may or may not effectively exercise its sovereign taxing authority to provide these critical

government services is inconsistent with the promotion of tribal sovereignty upon which the IRR Program is premised and with the express endorsement of a "tribal fuel tax" to accomplish the federal goals. In both *Bracker* and *Ramah*, this Court concluded that federal interests supported preemption even though the federal scheme failed to address expressly any aspect of sovereign taxing power. *See Ramah*, 458 U.S. at 841 n.5. Where, as here, the federal scheme expressly endorses using a tribal fuel tax to accomplish the federal goal, the federal interest in preempting an incompatible state tax is even stronger.

Bolstering the federal interest here is that state and local governments are a part of the problem. *See* ITA Amicus Br. 17-21. In assessing the effectiveness of the IRR Program, the Office of Management and Budget ("OMB") has determined that state and local governments "are refusing to use their [federal] funding to reconstruct [reservation] roads/bridges" and "do not maintain [reservation] roads adequately." Office of Mgmt. & Budget, Exec. Off. of the President, *PART Assessments, Dep't of the Interior* at 139, § 1.4, *available at* <http://www.whitehouse.gov/omb/budget/fy2006/pma/interior.pdf>. Tribes must thus redirect their federal funds, so that, "[i]n practice, non-BIA roads are being subsidized with IRR [federal] construction funds, effectively limiting the amount available for the reconstruction of BIA roads." *Id.* §§ 1.4, 1.5.

5. Other Acts of Congress strongly support preserving the tribal fuel tax. The Tribe's roads program is integrally related to its casino enterprise, and thus directly furthers the federal interests served by IGRA, which itself reflects "a comprehensive regulatory framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government."

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 (10th Cir. 1997) (internal quotation marks omitted). Congress passed IGRA to advance "tribal economic development, self-sufficiency, and strong tribal governments" through the establishment of Indian gaming enterprises. 25 U.S.C. § 2702(1).

The Tribe has used the casino precisely to this effect, relying on casino revenues to spur on-reservation economic development and to provide a full range of government services to members and non-members on the reservation – all as Congress intended. The Station, which is used overwhelmingly by casino patrons and employees, is an integral part of the casino enterprise, and part of the Tribe's effort to provide a full service resort to its customers. Moreover, the tribal tax revenues generated by the Station are used to improve the reservation infrastructure that is essential to the casino's success. *See supra* __. The federal interest in tribal self-sufficiency embodied in IGRA is thus directly advanced by the tribal tax and is jeopardized by the State's nullification of the tribal taxing power.

6. Finally, the Kansas Act for Admission provides that "nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property pertaining to the Indians of said territory." 12 Stat. 127, § 1 (1861); *see also In re Kansas Indians*, 72 U.S. 737, 756 (1866). Here, however, the State's boundaries result in such prohibited impairment, by precluding the Tribe's ability to tax: if not for the inclusion of the Tribe within the State's boundaries, the Tribe – which the State has recognized as a "separate and distinct nation[] inside the boundaries of the state of Kansas," *Kaul*, 970 P.2d at 65 – would be allowed the state exemption for out-of-state deliveries, and its rights would not then be impaired. *See*

K.S.A. § 79-3408(d)(1); *McClanahan*, 411 U.S. at 175-76 (relying on state enabling act in preemption analysis); *see also supra* p.16 n.3 (Kansas' statutes construed in favor of tribal taxpayer); Kansas Tribes Amicus Br. Part II.

In short, the State's tax "interfere[s] with the successful accomplishment of the federal purpose," *Mescalero II*, 462 U.S. at 336, of encouraging the exercise of tribal sovereignty to improve reservation roads and foster on-reservation economic development. The federal interest, like the tribal interest, thus weighs strongly in favor of preemption.

C. The State's Interests Are Minimal.

The State asserts an interest in its "sovereign power to tax its citizens" through the fuel tax because an "extensive, well-maintained road and bridge system is vital to the State's economy." Kan. Br. 11-12. But exempting delivery of fuel to the reservation from the state tax does not impair that interest in any material way. The fuel tax revenues generated by the Station amount to *less than one-tenth of one percent* of the total revenue the State collects through the fuel tax, and a trivial percentage of the total Kansas tax revenues (which were more than $6.1 billion in 2004). *See, e.g.*, *Mescalero II*, 462 U.S. at 343 (noting that the "loss of revenues to the State is likely to be insubstantial").

The State nevertheless claims it is justified in collecting all of the fuel tax for itself because "[m]ost of the non-Indian purchasers of the gasoline drive largely off-reservation." Kan. Br. 3-4. But many non-Indian drivers using tribal roads no doubt purchase their gasoline either off-reservation or at one of the two on-reservation stations that pay only the state tax. Because the Tribe sells fuel at market rates, there is no reason to believe (and the record supplies none) that the

market is distorted or that the State will be unfairly disadvantaged if the state tax is preempted.

Moreover, the State's effort to justify the fuel tax as a form of "use tax" for the privilege of driving on Kansas roads is specious. Kansas exempts the sale or delivery of fuel to other States, territories, foreign countries, and the United States without any determination of whether the ultimate purchasers of this fuel use Kansas roads. *See supra* Part I.B. The State cannot assert a legitimate interest in taxing all users of its roads when it exempts some users but not others. *Cf. Sac and Fox Nation,* 508 U.S. at 126-27 (striking down state road use tax where tax was "not imposed on all vehicles using the roads in Oklahoma" and where "[r]esidents of nearby States pay neither the excise tax nor the registration fee").

Similarly meritless is the State's contention that its tax is justified because "the distributor here is the state taxpayer" and the State provides services to the non-Indian distributor off the reservation. Kan. Br. at 39. But the distributor already pays taxes to the State for fuel that it uses personally when making deliveries over Kansas roads. Moreover, the State provides these same services to distributors providing fuel transported over Kansas roads to the United States and out of State, yet Kansas exempts those deliveries from the tax. The State's discrimination is further evidence of its diminished interest.

The State, citing *Cotton*, next claims its tax is permissible because the State and the County provide road services on the reservation. Kan. Br. at 38. But those state-provided services have little weight in the analysis. First, the State provides no services for tribally-maintained reservation roads. *See Cotton*, 490 U.S. at 184 (noting that State has no

interest in collecting revenue for use of roads that were "'built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors'") (quoting *Bracker*, 448 U.S. at 150). The state-provided services thus cannot justify the State's effort here to collect *all* tax revenues – from the Station, from the two other on-reservation gas stations that are immune from the tribal tax, and from the off-reservation stations located where drivers begin or end their journeys. Second, it is precisely because of inadequate funding and maintenance of roads on the reservation that the Tribe has taken over responsibility for roads previously maintained by the County and the State. *See* JA79 (noting failure of State and County to provide "proper road maintenance on the reservation"). To invoke inadequate maintenance now as a justification for the tax is to add insult to injury.[17]

Moreover, the neglect by the State and County of their obligation to provide services on the reservation belies the sincerity of the claimed state interest. The Tribe's fuel tax has allowed the Tribe to assume responsibility for reservation roads that the State and County would otherwise have to maintain. The tribal tax, which the State attempts to

[17] The State's suggestion that *Cotton* held that the provision of *any* on-reservation services is "dispositive" is thus meritless. Kan. Br. 39. *Cotton* did not involve the provision of inadequate state services, nor did the State's provision of some services allow it to seize *all* of the tax revenue, as the State seeks to do here.

There is, moreover, little in the record to support the State's contention that it provides substantial services on the reservation. The Tribe moved to exclude the State's evidence on this point, and the district court did not consider the evidence. JA 126-29. Most of the State's evidence concerned general services, rather than evidence of road construction and maintenance to which the state tax is dedicated. The remaining evidence does not remotely justify the State's capture of all fuel revenues.

displace, is thus consistent with the State's asserted interest in maintaining state and county roads. The only interest furthered by a displacement of a tribal tax dedicated to the upkeep of tribal roads is an interest in diverting funding away from such roads, which merits no weight at all.

Finally, the State complains that, "[w]ithout the ability to collect taxes to fund . . . services for 'internal order, improvement, and prosperity . . . ,' any notion of sovereignty is an illusion." Kan. Br. at 12 (quoting *The Federalist* (No. 45)). On this record, that is an extreme exaggeration. Moreover, it is precisely the *Tribe's* effort to fund services for "internal order, improvement, and prosperity" that the state tax entirely forecloses. The State's argument thus merely highlights both the State's cavalier disregard of the Tribe's legitimate interests in this case and its corresponding exaggerations of the state interests at stake.

* * *

Because the tribal and federal interests are so strong and the State's interest so comparatively weak, the Tenth Circuit correctly balanced the interests here.

IV. THE STATE TAX IMPERMISSIBLY INFRINGES THE TRIBE'S RIGHT TO SELF-GOVERNMENT.

The Kansas tax is also invalid on the "independent but related" ground that it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142 (quoting *Williams*, 358 U.S. at 220); *accord Mescalero II*, 462 U.S. at 334 n.16.[18]

[18] The Court has often had no need to pass on the infringement question, either because the preemption inquiry was dispositive or because the parties failed to raise the issue. *See, e.g.*, *Chickasaw*, 515 U.S. at 464.

The cases applying *Williams* "have dealt principally with situations involving non-Indians." *McClanahan*, 411 U.S. at 179. In those situations, where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," *id.*, the *Williams* test "resolve[s] th[e] conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected," *id.*; *see also id.* at 181 (denying state jurisdiction to tax); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (applying *Williams* and upholding tribal court jurisdiction).

Williams requires invalidation of the state fuel tax. As noted, "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government" that "enables a tribal government to raise revenues for its essential services." *Merrion*, 455 U.S. at 137; *see also Colville*, 447 U.S. at 152; *Rice*, 463 U.S. at 722. Here, it is not just the right to tax in the abstract that is at issue, but the Tribe's right – like that of the State and the United States – to impose a fuel tax to fund critical infrastructure projects that are essential to economic development and the provision of government services. Under *Williams*, the State could not have explicitly prohibited the Tribe from enacting a fuel tax. Yet the State's actions here – terminating the 1992 Agreement and eliminating the statutory exemption for the Tribe – have had the same effect. "The legal result must be the same, for what cannot be done directly cannot be done indirectly." *Carmell v. Texas*, 529 U.S. 513, 541 (2000) (quotation marks omitted). The Kansas fuel tax, no less than a direct prohibition, infringes on the Tribe's sovereign right to make its own tax laws and be ruled by them.

The State's principal response is that the infringement issue here "has never been raised." Kan. Br. 19 n.3. That

contention is frivolous. The Tribe raised the argument in the district court, and that court addressed the argument in detail. JA115-20. Similarly, the Tenth Circuit stated that "[t]he Nation asks us to invalidate the tax as it applies to the Nation's fuel *under two independent but related doctrines*. . . . [T]he Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government." JA135 (emphasis added); *see* Appellant's Br. 53-56 (10th Cir. filed Sept. 22, 2003) (raising infringement argument).

The State's only response on the merits is a cursory citation to *Cotton*. Kan. Br. 19 n.3. But *Cotton* noted expressly that the state tax did not affect the Tribe's ability to impose or raise taxes, 490 U.S. at 185; *see supra* pp. 31 & n.10, and thus *Cotton* does not aid the State. The state tax infringes the Tribe's governmental rights and independently requires invalidation of the state fuel tax here.

V. THE STATE'S PROPOSAL TO OVERRULE *BRACKER* SHOULD BE REJECTED.

Finally, the state proposes that *Bracker* be eliminated entirely, both on and off the reservation. For 30 years, however, this Court has confirmed that *Bracker*'s synthesis of 200 years of Indian law applies, including in three recent unanimous opinions. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999); *Chickasaw*, 515 U.S. at 458 (unanimous on this issue); *Milhelm Attea*, 512 U.S. at 73. The State must thus offer a "compelling justification" before this Court will "depart from the doctrine of *stare decisis*." *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

The State disputes this heavy burden by suggesting that "[*s*]*tare decisis* is not an inexorable command in the area of constitutional law." Kan. Br. 22. But *stare decisis* has

reduced force in constitutional cases "because in such cases correction through legislative action is practically impossible." *Seminole Tribe*, 517 U.S. at 63 (internal quotation marks omitted). Congress "remains free to alter" this Court's decisions regarding federal preemption and tribal sovereignty, and this case is thus equivalent to a question of statutory interpretation for *stare decisis* purposes, where respect for precedent is strongest. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Congress has never indicated dissatisfaction with *Bracker*'s synthesis, and the State does not contend otherwise.

Nor is there any other reason to reconsider that synthesis. The status of Tribes remains "anomalous" and "complex." *Bracker*, 448 U.S. at 142. Challenges to state regulation of relationships between Tribes and non-members still present the "difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah*, 458 U.S. at 836-37. And Indian law still operates against the backdrop of "'tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination." *Mescalero II*, 462 U.S. at 334. [19]

The State's main argument for discarding *Bracker*'s synthesis is its claim that the balancing test has proven unworkable. *See* Kan. Br. 22. But this court has had little trouble with its application, *see, e.g.*, *Milhelm Attea*, 512 U.S. 61 (unanimous opinion); *see also Ramah*, 458 U.S. at 846 (noting that this Court's "precedents announcing the

[19] *Bracker* thus comports with the many canons of Indian law that also "play an essential role in implementing the trust relationship between the United States and Indian tribes" by injecting consideration of tribal interests into the construction of federal statutes. Cohen, *supra*, at 225.

scope of pre-emption analysis in this area provide sufficient guidance"), and the State points to no crisis in the lower courts. Indeed, despite its rhetoric, the State cites only one Ninth Circuit case that it deems confusing. Kan. Br. 24.

Moreover, this Court has long recognized that, given the history and complicated interests at stake, ease of application is not the dominant consideration in Indian law. *See, e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (noting that "sovereign immunity bars the State from pursuing the most efficient remedy"); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 178 (1977). Petitioner's cries for "clear guidance, precise lines of demarcation," and its exaltation of categorical rules thus ring hollow here, Kan. Br. 32, for "[o]nly rarely does the talismanic invocation" of "rigid conceptions of state and tribal sovereignty shed light on difficult problems." *Colville*, 447 U.S. at 168 (Brennan, J., concurring); *see also Ramah*, 458 U.S. at 846.

The State's remaining arguments fare no better. It is simply not true that "in the taxation context . . . , more than any other area of civil regulation, concrete and reasonably *per se* rules are essential." Kan. Br. 22. The Federal Tax Code "makes liberal use of both situational rules [i.e., those that require a factual determination before the rule can be applied] and absolute rules." Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax Rev. 645, 685 (2003). Nor does this Court impose such rules at every opportunity. For example, in *Commissioner v. Soliman*, 506 U.S. 168, 174-75 (1993), the Court refused to "develop an objective formula that yields a clear answer in every case" regarding a taxpayer's principal place of business, and instead opted for a "more subtle" inquiry "dependent upon the particular facts of each case."

The State's reliance on *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), is similarly unavailing. Although the Court in *Quill* upheld a bright-line test for the applicability of a state tax, it relied principally on *stare decisis*. *See id.* at 317. Indeed, the Court noted, quite contrary to the State's argument, that its Commerce Clause jurisprudence concerning state taxes "now favors more flexible balancing analyses." *Id.* at 314.

Nor do *United States v. New Mexico*, 455 U.S. 720, 733 (1982) and *Blaze* provide strong reasons to abandon *Bracker*. *See* Kan. Br. 32. The Court in *New Mexico* adopted a narrow view of tax immunity for federal contractors because it recognized that "the political process is 'uniquely adapted to accommodating the competing demands in this area.'" 455 U.S. at 738. But the federal government's ability to protect its interests in Congress in competition with States does not mean that the Tribes have that same ability. *See Bracker*, 448 U.S. at 143-44 (noting that it is "treacherous to import" into Indian law notions of preemption that govern elsewhere). Moreover, in *Blaze*, this Court unanimously reaffirmed the applicability of *Bracker*. *See* 526 U.S. at 37.

Finally, eliminating balancing would have devastating consequences, spurring state taxation and regulation that would threaten tribal enterprises and even entire tribal regulatory schemes, such as those approved in *Bracker*, *Ramah*, and *Mescalero II*. There is no need – or reason – to eviscerate the policy of promoting tribal self-government and economic independence that Congress has long embraced.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

DAVID PRAGER, III
PRAIRIE BAND POTAWATOMI NATION
16281 Q Road
Mayetta, KS 66509
(785) 966-4030

IAN HEATH GERSHENGORN *
KATHLEEN R. HARTNETT
JESSICA RING AMUNSON
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

July 14, 2005

*Counsel of Record

Appendix A

Statutory Provisions Involved

K.S.A. § 79-3401

KANSAS STATUTES ANNOTATED
CHAPTER 79.--TAXATION
ARTICLE 34.--MOTOR VEHICLE FUEL TAXES
MOTOR-VEHICLE FUELS AND SPECIAL FUELS

79-3401. Citation of act; definitions.

This act, and amendments thereto, shall be known and may be cited as the "motor-fuel tax law," and as so constituted is hereinafter referred to as "this act." The following words, terms and phrases, when used in this act, shall have the meanings ascribed to them in this section, except in those instances clearly indicating a different meaning:

(a) "Aviation fuel" means motor fuels for use as fuel for aircraft;

(b) "agricultural ethyl alcohol" means a motor-vehicle fuel component with a purity of at least 99%, exclusive of any added denaturants, denatured in conformity with one of the methods approved by the United States department of the treasury, bureau of alcohol, tobacco and firearms, and distilled in the United States of America from grain produced in the United States of America;

(c) "bulk plant" means a motor fuels storage facility, other than a terminal, that is primarily used to redistribute motor fuels;

(d) "dealer" means any person engaged in the retail sale of motor-vehicle fuels or special fuels;

(e) "director" means the director of taxation, a duly authorized deputy, agent or representative;

(f) "distributor" means any person, who:

(1) Imports or causes to be imported from any other state or territory of the United States motor-vehicle fuels or special fuels for such person's own use in the state of Kansas, or for sale and delivery therein, after the same shall have come to rest or storage therein, whether or not in the original package, receptacle or container; or

(2) Imports or causes to be imported, from a foreign country, motor-vehicle fuels or special fuels for such person's own use in the state of Kansas, or for sale and delivery therein, after the same shall have come to rest or storage, whether or not in the original package, receptacle or container;

(3) Purchases or receives motor-vehicle fuels or special fuels in the original package, receptacle or container in the state of Kansas for such person's own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, or any other nation, in case such motor-vehicle fuels or special fuels have not, prior to such purchase or receipt, come to rest or storage in the state of Kansas; or

(4) Received and, in any manner, uses, sells or delivers motor-vehicle fuels or special fuels in the state of

Kansas on which the tax provided for in this act has not been previously paid;

(g) "exporter" means any person who exports or causes to be exported motor vehicle fuels or special fuels from Kansas to any other state or territory of the United States or to a foreign country, for such person's own use or for sale or delivery therein, whether or not in the original package, receptacle or container;

(h) "importer" means any person who imports or causes to be imported motor-vehicle fuels or special fuels from any other state or territory of the United States or from a foreign country, for such person's own use in the state of Kansas or for sale or delivery therein, whether or not in the original package, receptacle or container;

(i) "liquid fuels" or "motor fuels" means any inflammable liquid by whatever name such liquid shall be known or sold, which is used, or practically or commercially usable, either alone or when mixed or combined in an internal-combustion engine for the generation of power;

(j) "manufacturer" or "refiner" means any person who or which produces, refines, prepares, blends, distills, manufactures or compounds motor-vehicle fuels or special fuels in the state of Kansas for such person's own use therein, or for sale or delivery therein. The term "manufacturer" shall not include any person who or which mechanically separates liquids from natural gas at production facilities or gathering system pipelines on the lease. No person who produces, refines, prepares, blends, distills, manufactures, or compounds motor-vehicle fuels or special fuels shall be required to render a distributor's (manufacturer's) report as to any particular lot or lots of motor-vehicle fuels or special fuels until such motor-

vehicle fuels or special fuels have been loaded at a refinery or other place of production into tank cars, or placed in any tank at such refinery or other place of production from which any withdrawals are made direct into tanks, tank wagons or other types of transportation equipment, containers or facilities;

(k) "motor vehicle" means a motor vehicle as defined by K.S.A. 8-126, and amendments thereto, and which is required to be registered pursuant to K.S.A. 8-126 et seq., and amendments thereto;

(l) "motor-vehicle fuels" means gasoline, casinghead gasoline, natural gasoline, drip gasoline, aviation gasoline, gasohol, gasoline-oxygenate blend and any other spark-ignition motor fuel as defined by the 1995 United States department of commerce, national institute of standards and technology handbook 130 issued December of 1994, and as may subsequently be defined in rules and regulations which the director may adopt pursuant to K.S.A. 79-3419, and amendments thereto;

(m)"oil inspector" means the director of taxation, a duly authorized deputy, agent or representative;

(n) "person". means every natural person, association, partnership, limited partnership, limited liability company or corporation. When used in any statute, prescribing and imposing a fine or imprisonment, or both, the term "person" as applied to firms and associations means the partners or members thereof and, as applied to corporations, the corporation and the officers thereof;

(o) "public highways" means and includes every way or place, of whatever nature, generally open to the use of the public as a matter of right, for the purposes of vehicular

travel and notwithstanding that the same shall have been temporarily closed for the purpose of construction, reconstruction or repair;

(p) "received" means motor-vehicle fuel or special fuel produced, refined, prepared, distilled, manufactured, blended or compounded at any refinery or other place, in the state of Kansas by any person, or imported into this state from any other state, territory, or foreign country by pipeline or connecting pipeline at a pipeline terminal or pipeline tank farm for storage, shall be deemed to be "received" by such person thereat when the same shall have been loaded at such refinery, pipeline terminal, pipeline tank farm or other place, into tank cars, tank trucks or other container, or placed in any tank from which any withdrawals are made direct into tank cars, tank trucks or other types of transportation equipment, containers or facilities;

(q) "retailer" means a person that engages in the business of selling or distributing motor fuels to the end user;

(r) "school bus" means every bus, as defined by K.S.A. 8-1406, and amendments thereto, which is: (1) Privately owned and contracted for, leased or hired by a school district or nonpublic school for the transportation of pupils, students or school personnel to or from school or to or from school-related functions or activities; or (2) owned and operated by a school district or nonpublic school which is registered under the provisions of K.S.A. 8-126 et seq. , and amendments thereto, used for the transportation of pupils, students or school personnel to or from school or to or from school-related functions or activities;

(s) "special fuels" means all combustible liquids suitable for the generation of power for the propulsion of motor vehicles including, but not limited to, diesel fuel, alcohol and such fuels not defined under the motor-vehicle fuels definition, hereinafter referred to as motor-vehicle fuel;

(t) "terminal" means a fuel storage and distribution facility that is supplied by motor vehicle, pipeline or marine vessel, and from which motor fuels may be removed at a rack. "Terminal" does not include any facility at which motor fuel blend stocks and additives are used in the manufacture of products other than motor fuels and from which no motor fuels are removed;

(u) "terminal operator" means the person who by ownership or contractual agreement is charged with the responsibility for, or physical control over, and operation of a terminal;

(v) "transporter" means a person who has been issued a liquid-fuels carrier's license pursuant to K.S.A. 55-506 et seq. , and amendments thereto.

K.S.A. § 79-3402

79-3402. Purpose of tax.

The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways, including the payment of bonds issued for highways included in the state system of this state, and the cost and expenses of the director of taxation and the director's agents and

employees incurred in administration and enforcement of this act and for no other purpose whatever.

* * * *

K.S.A. § 79-3408

79-3408. Tax imposed on use, sale or delivery of motor-vehicle fuels or special fuels; pumps labeled to show alcohol content; incidence of tax imposed on distributor; allowance for certain losses; exempt transactions; reports required.

(a) A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.

(b) Every retail pump for motor-vehicle fuels shall be conspicuously labeled to show the content and percentage of any ethyl alcohol or other alcohol combined or alone in excess of 1% by volume.

(c) Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein, except that an allowance of 2.5% shall be made and deducted by the distributor to cover all ordinary losses which may have resulted from physical loss while handling such motor-vehicle fuels or special fuels. No such allowance shall be made on any motor-vehicle fuel or special fuel exported from the state or sold to the

United States of America or any of its agencies or instrumentalities as are now or hereinafter exempt by law from liability to state taxation. No such allowance shall be made for any motor-vehicle fuel or special fuel sold or disposed of to a consumer in tank car, transport or pipeline lots.)

(d) No tax is hereby imposed upon or with respect to the following transactions:

(1) The sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

(2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation.

(3) The sale or delivery of motor-vehicle fuel or special fuel to a contractor for use in performing work for the United States or those agencies of the United States above mentioned, provided such contractor has in effect with the United States or any such agency a cost-plus-a-fixed-fee contract covering the work.

(4) The sale or delivery of motor-vehicle fuel or special fuel which is aviation fuel.

(5) The first sale or delivery of motor-vehicle fuel or special fuel from a refinery, pipeline terminal, pipeline tank farm or other place to a duly licensed distributor who in turn resells to another duly licensed distributor.

(6) The sale or delivery of special fuel which is indelibly dyed in accordance with regulations prescribed pursuant to 26 U.S.C. 4082 and such special fuel is only used for nonhighway purposes.

(7) The sale of kerosene used as a fuel only to power antique steam motor vehicles first manufactured prior to 1940.

(e) Each distributor, manufacturer, importer, exporter or retailer shall make full reports and furnish such further information as the director may require with reference to all transactions upon which no tax is to be paid.

K.S.A. § 79-3409

79-3409. Distributor to collect tax; price sign requirements.

Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor-vehicle fuels or special fuels sold or delivered by such distributor, as a part of the selling price. When the price of motor-vehicle fuels or special fuels posted on a price sign does not include the state and federal tax which such retail dealer's distributor paid or for which the distributor was liable, the total of the taxes must be shown in numbers the same size as the price of the motor fuel. Any deviation from the maximum price charged for a given grade of motor-vehicle fuels or special fuels must be stated in letters at least six inches high and legible. Fractions of cents must be posted in numbers at least 1/5 the height of the whole number.

* * * *

K.S.A. § 79-3417

79-3417. Refunds for lost or destroyed fuels; procedure.

Every distributor shall be entitled to a refund from the state of the amount of motor-vehicle fuels or special fuels tax paid on any motor-vehicle fuels or special fuels of 100 gallons or more in quantity, which are lost or destroyed at any one time while such distributor is the owner thereof, through theft, leakage, fire, explosion, lightning, flood, storm or other cause beyond the control of the distributor. Such distributor shall notify the director in writing of such loss or destruction, the specific cause thereof, and the amount of motor-vehicle fuel or special fuel so lost or destroyed, within 60 days from the date of such loss or destruction. Within 30 days after notifying the director of such loss or destruction such distributor shall file with the director an affidavit on oath, stating the full circumstances and amount of the loss or destruction and other information requested by the director.

The director shall examine all such claims and determine the amount to which the claimant is entitled. If any distributor entitled to a refund owes the state any motor-vehicle fuel or special fuel tax, penalties, or interest, the refund authorized by this section shall be credited upon such taxes, penalties and interest. When the director determines that any distributor is entitled to a refund under this section, and such refund cannot be effected by giving credit therefor, the director shall sign a voucher for the refund. Such amount shall be paid to the distributor from the revenue administration fee fund.

* * * *

K.S.A. § 79-3425

79-3425. Payment into state treasury; distribution of proceeds of tax.

All of the amounts collected under the motor-fuel tax law and amendments thereto, except amounts collected pursuant to K.S.A. 79-3408c, and amendments thereto, shall be remitted by the director to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury. The state treasurer shall credit such amount as the director shall order in the motor-vehicle fuel tax refund fund to be used for the purpose of paying motor-vehicle fuel tax refunds as provided by law. The state treasurer shall credit the remainder of such amounts as follows: To the state highway fund amounts specified in K.S.A. 79-34,142, and amendments thereto, to a special city and county highway fund which is hereby created, amounts specified in K.S.A. 79-34,142, and amendments thereto, to be apportioned and distributed in the manner provided in K.S.A. 79-3425c, and amendments thereto, and to the current production account and the new production account of the Kansas qualified agricultural ethyl alcohol producer incentive fund, which is hereby created in the state treasury, in the amount and in the manner specified in K.S.A. 79-34,161, and amendments thereto, to be expended in the manner provided in K.S.A. 79-34,162, and amendments thereto.

* * * *

K.S.A. § 79-34,141

79-34,141. Rates of tax per gallon on vehicle fuels.

On and after July 1, 2002, until July 1, 2003, the tax imposed under this act shall be not less than:

(a) On motor-vehicle fuels, $.23 per gallon, or fraction thereof;

(1) on special fuels, $.25 per gallon, or fraction thereof; and

(2) on LP-gas, $.22 per gallon, or fraction thereof.

(b) On and after July 1, 2003, until July 1, 2020, the tax imposed under this act shall be not less than:

(1) On motor-vehicle fuels, $.24 per gallon, or fraction thereof;

(2) on special fuels, $.26 per gallon, or fraction thereof; and

(3) on LP-gas, $.23 per gallon, or fraction thereof.

(c) On and after July 1, 2020, the tax rates imposed under this act shall be not less than:

(1) On motor-vehicle fuels, $.18 per gallon, or fraction thereof;

(2) on special fuels, $.20 per gallon, or fraction thereof; and

(3) on LP-gas, $.17 per gallon, or fraction thereof.

K.S.A. § 79-34,142

79-34,142. Distribution of proceeds of vehicle fuel taxes.

(a) On and after July 1, 2002, until July 1, 2003, the state treasurer shall credit amounts received pursuant to K.S.A. 79-3408, 79-3408c, 79-3491a, 79-3492 and 79-34,118 and amendments thereto as follows: To the state highway fund 64.6% and to the special city and county highway fund 35.4%.

(b) On and after July 1, 2003, until July 1, 2020, the state treasurer shall credit amounts received pursuant to K.S.A. 79-3408, 79-3408c, 79-3491a, 79-3492 and 79-34,118, and amendments thereto, as follows: To the state highway fund 66.37% and to the special city and county highway fund 33.63%.

(c) On and after July 1, 2020, the state treasurer shall credit amounts received pursuant to K.S.A. 79-3408, 79-3408c, 79-3491a, 79-3492 and 79-34,118 and amendments thereto as follows: To the state highway fund 55.3% and to the special city and county highway fund 44.7%.

POTAWATOMI LAW AND ORDER CODE

TITLE 10
GENERAL REVENUE AND TAXATION

CHAPTER 10-6
MOTOR FUEL TAX

Section 10-6-1. Tax on Motor Fuel

(A) There is hereby imposed a tax for the privilege of doing business which is measured by the sale of motor fuel within the tribal jurisdiction, which includes, without limitation, the entire Prairie Band Potawatomi Reservation territory. This tax shall be as follows:

(1) **Gasoline Motor Fuel.** A tribal tax equal to 20 cents for each gallon of gasoline or gasohol sold at retail.

(2) **Diesel Motor Fuel.** A tribal tax equal to 22 cents for each gallon of diesel fuel sold at retail.

The effective date for the tax rates specified in this subsection shall be January 1, 2003.

(B) The retailer of the motor fuel is the taxpayer. The above taxes shall be paid by the retailer and its shall be the duty of the retailer to collect and remit the tax from the payment made by the purchaser to the retailer, to file monthly returns with the Tax Commission, and to pay to the Tax Commission the taxes that are required to be collected.

(Amended by PBP TC No. 2000-26, February 1, 2000; amended by PBP TC No. 2002-149, December 5, 2002.)

Section 10-6-2. Payment of the Tax.

(A) Every retailer shall submit to the Tax Commission within fourteen (14) calendar days after the end of each calendar month a report which states the gallons of motor fuel sold and amount of taxes due and collected during the calendar month. The monthly report shall state the name, address and telephone number of all distributors and transporters from whom the retailer has received deliveries of motor fuel and the gallons of each kind of motor fuel received.

(B) Every retailer shall pay the taxes collected or required to be collected during the calendar month to the Tax Commission at the same time as the report for the calendar month is submitted.

Section 10-6-3. Estimates for Unreported Taxes.

In the event the retailer fails to file a full and complete report as required above, the Tax Commission may estimate and assess the tax liability for the retailer based upon estimates of motor fuel sales at the retailer's location.

Section 10-6-4. Lien for Unpaid Taxes.

All taxes, interest and penalties for unpaid motor fuel taxes or for any of the other unpaid taxes imposed under tribal law shall be a lien upon all real, personal or other property of the retailer which is located within the tribal jurisdiction.

Section 10-6-5. Liability of Officers, Directors and Managers.

The officers and directors of a corporation which is making retail sales for which a tax is imposed under this title shall be personally liable for any unpaid taxes, interest and penalties. Any other managers or employees of a corporation who disburse business funds at a time when tribal taxes are due and unpaid shall be personally liable for such taxes, interest and penalties.

Section 10-6-6. Reports of Distributors and Transporters.

A distributor or transporter of motor fuel, upon request of the Tax Commission, shall provide a detailed report of all motor fuel deliveries made within the tribal jurisdiction. In the event of the failure or refusal to provide such a report, the distributor or transporter shall be liable for a $100 civil penalty for each day for which there is a refusal or failure.

(Amended by PBP TC No. 2000-82, May 2, 2000)

Section 10-6-7. Use of Tribal Motor Fuel Tax Revenue.

All tribal motor fuel tax revenue imposed and collected hereunder shall be used by the Prairie Band Potawatomi Nation's government for the purpose of constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation.

Section 10-6-8. Effective Date.

The provisions of this resolution shall take effect on the first day of the month following the month in which this resolution is approved by the Tribal Council.

(Title 10-6 enacted by PBP TC No. 99-1, January 11, 1999; amended by PBP TC No. 99-66, May 11, 1999; amended by PBP TC No. 2000-82, May 2, 2000)

(Title 10 enacted by PBP TC No. 87-37, August 26, 1987; amended by PBP TC, July 20, 1989; amended PBP TC No. 92-66, November 18, 1992; Title 10-6 enacted by PBP TC No. 99-1, January 11, 1999; amended by PBP TC No. 99-66, May 11, 1999; amended by PBP TC No. 2000-26, February 1, 2000; amended by PBP TC No. 2000-82, May 2, 2000; amended by PBP TC No. 2000-82, May 2, 2000; December 5, 2002, amended by PBP TC No. 2002-149)

APPENDIX B

KANSAS DEPARTMENT OF REVENUE
CUSTOMER RELATIONS
TOPEKA, KANSAS 66625-8000
www.ksrevenue.org
Phone Number (785) 368-8222
FAX (785) 296-6993

For Office Use Only

DISTRIBUTORS TAX RETURN For Month of

License #

Form #

Tax should be computed at the rate of:	GASOLINE .24	GASOHOL .24	SPECIAL FUEL .26
SEE INSTRUCTIONS ON REVERSE	Gasoline	Gasohol	Special Fuel
1. Total net gallons of gasoline, gasohol and special fuel received or imported. (Attach MF-52a, Schedule of Receipts)			
2. Deductions - Net Gallons Only (Attach MF-52b, Schedule of Disbursements)	Gasoline	Gasohol	Special Fuel
(a) Exports			(DO NOT INCLUDE DYED DIESEL.)
(b) U.S. Govt.			(DO NOT INCLUDE DYED DIESEL.)
(c) Aviation			(DO NOT INCLUDE DYED DIESEL.)
(d) N/A as of 7/1/95			(see instructions on reverse)
(e) Dyed Diesel			(see instructions on reverse)
(f) Total of Lines 2(a) through 2(e)			
3. Net gallons after deductions (Line 1 less Line 2(f))			
4. Does not apply as of 7/1/95			
5. Sales to consumers in tank car, transport or pipeline lots (See instructions on reverse)			
6. Net gallonage on which allowance applies. Line 3 plus line 4 less line 5			
7. Less handling allowance (See instructions on reverse) NO ALLOWANCE FOR IMPORTERS			
8. Gallons subject to tax (Line 6 less line 7 plus line 5)			
9. Tax (Line 8 times appropriate rate)			
10a) Total Gas & Gasohol Tax Due	10b) Total Special Fuel Tax Due		
11 (a) Total Gas & Gasohol Penalty & Interest	11(b) Total Special Fuel Penalty & Interest		
12a) Total Gas & Gasohol Amount Due	12b) Total Special Fuel Amount Due		
13) Amount Remitted. Payable to the Director of Taxation. Line 12a plus Line 12b)			

I certify that this is a true, complete and accurate return for the period stated above.

Signature _____

MF 52
(Rev. 10/03)

Title Telephone No.

BEST AVAILABLE COPY

INSTRUCTIONS FOR MOTOR VEHICLE FUELS TAX RETURN (MF/52)

This report must be prepared for each calendar month and must be postmarked on or before the 25th of the following month. If you have no receipts or imports during the month, write across the face of the report "No motor vehicle fuels or special fuels received (or imported) this month". Failure to report as specified will cause the addition of penalty at 5% of tax and interest at the appropriate rates as found on our web site: **www.ksrevenue.org**. ROUND GALLONS TO THE NEAREST WHOLE GALLON - DO NOT ROUND DOLLAR FIGURES (INCLUDE CENTS).

1. Receipts - Enter the total net gallons of gasoline, gasohol and special fuel received or imported. (*Include dyed diesel fuel received if applicable. Sales to other licensed distributors are not to be included in line 1 of the return nor in any other lines of the tax return. However, a schedule of disbursements must be completed for these sales).*

2. Deductions - Enter the deductions that apply to your business. Use net gallons only.
   a) Exports - Net gallons of fuel exported from Kansas. *(Dyed diesel is not to be included. All dyed diesel is reported in line 2e. If dyed diesel is exported, you must include a schedule of disbursements for this fuel.)*
      Attach (2) Copies Schedule of Disbursements.
   b) U.S. Government - Net gallons of fuel sold to the U.S. Government. *(Dyed diesel is not to be included. All dyed diesel is reported in line 2e. If dyed diesel is sold to the U.S. Government, you must include a schedule of disbursements for this fuel.)*
      Attach (1) Copy Schedule of Disbursements.
   c) Aviation - Net gallons of fuel sold for aviation purposes.
      Attach (1) Copy Schedule of Disbursements.
   d) Not applicable as July 1, 1995.
   e) Dyed Diesel - Net gallons of dyed diesel fuel *received* for the month - these gallons should be the same gallons included in line 1.
   f) Total of lines 2a through 2e.

3. Net gallons after deduction - (line 1 minus line 2f).

4. Does not apply as of July 1, 1995.

5. Sales to consumers in tank car, transport, or pipeline lots - Net gallons of taxable fuel sold directly to consumers. (*These gallons are subject to fuel tax but cannot be used when computing the handling allowance.)*

6. Net gallonage on which allowance applies - Line 3 (net gallons after deduction) minus line 5 (sales to consumers).

7. Handling allowance - Use 2.5% of line 6 for total gallons of gasoline, gasohol and special fuel.
   Importers are not allowed a handling allowance.

8. Gallons subject to tax - Line 6 (net gallons on which allowance applies) minus line 7 (handling allowance) plus line 5 (sales to consumers).

9. Tax - Line 8 gallons subject to tax - (multiplies by the appropriate tax rate).

10. Sum of total tax due.

    10a) Total of gas (line 9) plus Total gasohol (line 9).
    10b) Total of special fuel (line 9).

11. Penalty and interest (If filing a late return, add penalty at 5% of tax and interest at the appropriate rates as found on our web site: www.ksrevenue.org.)

12. Total Amount Due - (line 10 plus line 11).

13. Amount remitted - (Total of line 12a plus line 12b).

APPENDIX C

KANSAS DEPARTMENT OF REVENUE
CUSTOMER RELATIONS
915 SW HARRISON ST.
TOPEKA, KANSAS 66625-2000
Phone Number: (785) 368-8222
www.ksrevenue.org

MOTOR FUEL TAX MULTIPLE SCHEDULE OF RECEIPTS GASOLINE

COMPANY NAME | FEIN NO. | LICENSE NO. | TYPE OF SCHEDULE | MONTH & YEAR

TYPE OF SCHEDULE
1 Gallons received tax paid
2 Gallons received from licensed motor fuel distributors tax unpaid
3 Gallons exported from another state direct to customers

PC - TYPE OF PRODUCT
65 - GASOLINE
122 - BLENDING COMPONENTS
123 - ALCOHOL
124 - GASOHOL
125 - AVIATION GASOLINE
OTHER (see FTA Product Code list)

(1) NAME OF CARRIER	(2) CARRIER FEIN	(3) MODE	(4) POINT OF ORIGIN CITY, STATE	(5) POINT OF DESTINATION CITY, STATE	(6) ACQUIRED FROM NAME OR DISTRIBUTOR LICENSE #	(7) SELLERS FEIN	(8) DATE	(9) MANIFEST NUMBER	(10) NET GALS	PC
								TOTAL		

MF-52A (Gasoline)
(Rev. 4/04)

SEE INSTRUCTIONS ON REVERSE

INSTRUCTIONS FOR SCHEDULE OF RECEIPTS, GASOLINE (MF-52A)

This schedule(s) provides detail in support of the gallons shown as receipts on line 1 of the distributor's return. Each receipt of product must be listed on separate lines of the appropriate schedules.

Schedule Type - Enter the appropriate schedule number, using separate schedules for each fuel type.

Column Instructions

Columns 1 & 2
Carrier - Enter the name and FEIN of the company that transports the products.

Column 3
Mode of Transport - Enter the mode of transport. Use one of the following: J - Truck, PL - Pipeline, B - Barge, R - Rail, O - Other.

Column 4
Point of origin - Enter the location from which the product was transported. (IRS Terminal Code may be substituted in place of origin city and state.)

Column 5
Point of destination - Enter the city and state of the final destination.

Column 6
Acquired From - Enter the name or Distributor license number from which product was acquired (Company that is listed in column 6).

Column 7
Seller's FEIN - Enter the FEIN of the company from which the product was acquired.

Column 8
Date of Manifest.

Column 9
Manifest Number - Enter the manifest/bill of lading number.

Column 10
Net gallons only. Provide a grand total for this column that can be carried forward to the distributor's return.

PC - Product Code - Enter the appropriate product code.